

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 619 OF 2003

Vithu Kalya Mahar @ Kamble..... Appellant

versus

Gangaram Gopal Kamble & ors.....respondent.

Mr. Pradip R. Kadam for the appellant.

**CORAM; V.R. KINGAONKAR, J.
DATED; 11TH JANUARY 2007**

P.C.:

1. Heard the learned counsel.

2. The suit was filed for partition, separate possession. The suit came to be decreed. The original defendant has challenged the findings of both the courts.

3. The learned advocate for the appellant submits that no issue was framed by the trial court regarding identity of Kalya Mahar @ Kamble from whom the respondent/plaintiffs were claiming their share. He therefore submits that the appellant had raised a question of fact that his father by name Kalya had no relation with the defendants. The learned counsel further submit that burden of proof was placed on the defendant and it is therefore a substantial question

of law. I do not agree. The question of burden of proof is only of academic interest, after the trial is over. Though there was no issue as such before the trial court, yet, the evidence in this behalf was considered and finding is reached in favour of the plaintiff/respondent. The first appellate court raised specific points in this context. The appellate court came to the conclusion that the plea was raised by the present appellant at a very belated stage and that conduct by itself was indicative of after thought plea, so as to deny relations with the defendants. The first appellate court also considered the other evidence on record including that of the power of attorney and oral evidence of the parties. The first appellate court came to the conclusion that said "Kalu" and "Kalya" are the same persons. The evidence of the appellant/defendant would reveal that he was unable to locate whether his grand-father by name 'Kalya' and 'Kalu' were different persons. His grandfather demised a way back and hence the defendant/appellant had no personal knowledge regarding the affairs which did prevail at that time. The findings recorded by both the courts do not show any perversity. No substantial question of law is involved. The appeal is therefore dismissed. Civil Application if any is also dismissed.